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SUPREME COURT, U.S.
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No. 14

In the Supreme Court of the United States

October Term, 1940

Republic Steel Corporation, Petitioner

v.

National Labor Relations Board and Steel Workers Organizing Committee

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 14

REPUBLIC STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND STEEL WORKERS ORGANIZING COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. VIII, 6277–6292) is reported in 107 F. (2d) 472. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. II, 833–1109) are reported in 9 N. L. R. B. 219.

JURISDICTION

The decree of the court below (R. VIII, 6294–6299) was entered on January 2, 1940. The petition for writ of certiorari was filed on February

7, 1940, denied on April 8, 1940 (309 U. S. 684), and granted upon petition for rehearing on May 20, 1940, limited to the fourth question presented in the petition, which relates to the validity of the work-relief provisions of the decree below. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, as part of a back-pay order, it was within the power of the Board to require petitioner to deduct from the back pay any sums which the employees have received for work performed upon work-relief projects and to pay over such sums to the appropriate governmental agencies.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon charges (R. I, 1–12) filed by the Steel Workers Organizing Committee, a labor organization hereafter called the S. W. O. C., and after various procedural steps which need not be detailed, the Board on October 18, 1938, upon the entire record in the case, issued its decision and order (R. II, 833–1109).

The Board found that petitioner, by dominating and interfering with the formation and adminis-

tration of various labor organizations of its employees, and by contributing financial and other support thereto, had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. II, 1079–1081). The Board also found that petitioner, by discharging or refusing to reinstate 26 named employees because of their union membership and activity, and by discriminatorily locking out its employees at the Massillon Works and the Canton Tin Plate Mill, had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. II, 1080–1081). The Board further found that petitioner, by coercing and intimidating its employees in various ways in the exercise of their rights to self-organization and collective bargaining, had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. II, 1081). Finally, the Board found that a strike at petitioner's plants was caused by petitioner's unfair labor practices (R. II, 1071–1075).

Upon these findings, the Board ordered petitioner to cease and desist from the unfair labor practices; to withdraw recognition from and disestablish the company-dominated labor organizations; to reinstate with back pay for appropriate periods the 26 named employees who were discriminatorily discharged or refused reinstatement; to make whole the Canton Tin Plate and Massillon employees for losses of pay suffered by reason of

the lock-outs; upon application, to offer reinstatement or placement upon a preferential list to the employees who went on strike, except certain employees convicted of serious offenses; to make whole the employees who went on strike for any losses of pay they might suffer through petitioner's refusal to reinstate them or place them on a preferential list within 5 days after application; to deduct from the payments to employees in all the foregoing groups any sums received by the employees for work performed upon work-relief projects, and pay over such sums to the appropriate governmental agencies; and to post appropriate notices (R. II, 1104–1109).

On October 20, 1938, petitioner filed in the court below its petition to review and set aside the Board's order (R. VII, 5173–5207). The Board filed an answer requesting that the petition to review be dismissed and that the Board's order be enforced (R. VII, 5208–5221). On November 8, 1939, the court handed down its decision (R. VIII, 6277–6292) enforcing the Board's order except as to the reinstatement of certain employees convicted of offenses deemed by the court to be of a sufficiently serious nature to preclude their reinstatement (R. VIII, 6290–6292). A decree was entered accordingly on January 2, 1940 (R. VIII, 6294–6299). On May 20, 1940, this Court granted a writ of certiorari limited to the question whether the decree below, in so far as it enforces the pro-

visions of the Board's order requiring petitioner to deduct the amounts of work relief payments from back pay and to pay over such amounts to appropriate governmental agencies, is proper.

SUMMARY OF ARGUMENT

The Board found that petitioner had deprived various of its employees of employment because of their union membership or activities. That petitioner must compensate these employees for pay lost is now settled: the Board was faced with the further question of what effect it should give to payments which had been received by the employees from work relief projects. The Board determined that the policies of the Act would best be served if these payments were reimbursed to the governments which had financed the relief projects. We contend that the order effectuating this determination is within the power of the Board under the Act.

A

It will effectuate the policies of the Act to require petitioner to reimburse the governments. The back pay order specifically authorized in Section 10 (c) effectuates the Act by making whole the employees for loss of earnings, and, no less important, by providing a substantial deterrent—with reinstatement, the only deterrent specifically authorized in the Act—to employer violation. The reimbursement provision prevents employers from shifting to

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work relief agencies the financial burden of back pay and thereby eliminating in part the deterrent effect of a back pay order. Nor is reimbursement a "penal" deterrent, since it but serves to create the situation which would have existed save for the unfair labor practices.

Petitioner's contention that the reimbursement provision will, by causing relief agencies to prefer strikers, encourage employees to resort to industrial strife, is unsound. It is the practice of the Board, followed here, to order back pay only for periods when employees are out of work as the result of a discriminatory lock-out, discharge or denial of reinstatement, and not for periods when employees are voluntarily on strike. Further, nothing in the Act prescribes that the economic sanction against strikes which existed before the Act, namely the privation resulting from unemployment, must be preserved by the Board. And a denial of reimbursement might lead relief agencies to view with disfavor employees in the position of petitioner's, since such employees are contingently in a better position than are unemployed workers who have no possibility of reinstatement or back pay. Avoidance of such a result tends to effectuate the policies of the Act.

Petitioner argues that the power of the Board is limited to restoring employees to their status

quo. But in framing remedies under the Act the Board acts for the protection of public interests, not of private rights. Here the Board concluded that the relief payments represented a beneficence from outside agencies which neither petitioner nor the employees were entitled to retain. If, as it is not denied, the Board was competent to decide that the employees should not retain the benefits of the relief payments, it was also competent to decide that the payments should not be credited to petitioner but should be restored to the governments.

B

Petitioner argues that the Government suffered no loss by reason of the payments to petitioner's employees, because the projects received value in labor for the wages paid the employees. This argument is unsound, for examination of the federal work relief program reveals that it is basically a relief device and not a public works program.

C

The Board could hold that, as between petitioner and its employees, the latter are entitled to retain the work relief payments, and the Board could properly require the latter to reimburse the governments which supported them. The validity of the Board's order must be considered in this context.

In deducting from back pay amounts earned by the workers in the service of other employers, the Board follows the common law rule as to the measure of damages for breach of an employment contract. The common law distinguishes, however, between earnings which are in the nature of wages and benefits conferred by third parties, whether the benefits be gratuities or payments secured by the worker's own foresight, such as insurance or strike benefits. Such benefits are not deducted from recovery. Here the Board could properly hold that payments from work relief agencies resemble benefits from outside sources more than they do earnings from ordinary employment. Hence the Board could properly refuse to permit the employer to deduct work relief payments from back pay.

Payment of back pay to the employees places them in a position to reimburse the relief agencies which assisted them, without net loss to themselves. The Board might properly regard such repayment as an equitable obligation of the employees and require that it be satisfied as a condition of the back pay order.

D

Various minor objections raised by petitioner to the reimbursement order, such as the absence of the fiscal agencies as parties and alleged difficulty of compliance with the order, are unsubstantial

ARGUMENT

As a preliminary matter, we wish to call to the Court's attention the fact that the petition for certiorari in this case contains no specification of errors. Read literally, the Court's rules do not require that a petition for certiorari contain a specification of errors, but only that the supporting brief, if one is filed, contain a specification. Rule 38, par. 2; Rule 27, par. 2. No supporting brief was filed by petitioner in this case; accordingly it is our belief that no specification of errors was necessary. See *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; Robertson and Kirkham, *Jurisdiction of the Supreme Court*, p. 780, fn. 51. There is, however, some uncertainty on this score among the profession, and a definite ruling by the Court would be of future assistance to the bar.

Section 10 (c) of the National Labor Relations Act directs the Board, if it finds that the person proceeded against has engaged in any unfair labor practice, to order such person to cease and desist from such practice, "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." In the present case the Board found that petitioner, in addition to other unfair labor practices, had laid off, discharged, or refused reinstatement to various of its employees because of

their membership in the S. W. O. C., and had thus deprived these employees of work for various periods in violation of the Act.

The S. W. O. C. had excepted to the Board's proposed back pay order "insofar as it may be interpreted to permit the respondent [petitioner] to deduct from back wages to be paid to any individual any sum which such individual may have earned on W. P. A. or other public relief employment" (R. I, 781). In considering this exception, the Board stated in its decision that insofar as the employees had received work relief payments it was not necessesy, in restoring them to the status quo, that the back pay to be paid to them include the amounts of relief payments (R. II, 1096). "Nevertheless," the Board added, "to hold that the losses accruing from the respondent's [petitioner's] unfair labor practices must be borne by the government or governments financing the work relief project would not effectuate the purposes of the Act." In this situation the Board ordered that the governments be reimbursed for the relief funds expended; that is, that petitioner deduct the amounts of relief payments from back pay, and pay over to the appropriate governments the amounts so deducted. The Board thus determined that as between petitioner, its employees, and the governments financing the relief agencies, the effectuation of the purposes of the Act would best be served if the governments received the funds in

question. It is this determination, or the provisions in the order effectuating it, which are attacked here as beyond the power of the Board.

THE PROVISION FOR REIMBURSEMENT OF RELIEF FUNDS IS WITHIN THE BOARD'S POWER

A. TO REQUIRE PETITIONER TO REIMBURSE THE FISCAL AGENCIES WILL EFFECTUATE THE POLICIES OF THE ACT

Upon finding a violation of the Act, the Board, in addition to issuing a cease and desist order, may require an employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." By its terms this is a ~~board~~ broad discretionary power. "Notwithstanding the mandatory form of § 10 (c), its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265,

Basic in the scheme of remedies envisaged by Congress and enumerated in Section 10 (c) as a permissible type of affirmative relief, is an order that the employer make whole his employees for any loss of pay suffered as a result of the employer's unfair labor practices. Back pay compensates the employees for wages lost as a result of the employer's unfair labor practices, although it does

not, of course, fully eradicate the probable effects on the employees, financial and otherwise, of having been for long periods without income. No less important in effectuating the policies of the Act, the back-pay order is a substantial deterrent to employer violation, as Congress must have foreseen in specifically providing for it. Such an order thus serves both to protect the worker in the exercise of his rights and to discourage the employer from infringing them. "Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48–49.

The Act prohibits an employer from depriving his employees of work because of their union membership or activities, as petitioner did. The Act plainly contemplates that the employer may ultimately be charged with the wages employees have thus lost. The Board cannot, however, compel the employer to assume this burden until after the employer's responsibility has been duly established. A delay of months or years may ensue, as in this case where the unfair labor practices occurred in 1937. Pending the realization of these statutory remedies, the employees may be without means of support. If, as part of a program of work relief, various governmental agencies assume the burden of supporting the employees—a burden which the

Act places upon the employer—then reimbursement of these agencies serves to effectuate the policies of the Act. To hold otherwise would permit the employer to cast onto the community those burdens which the Act places on his shoulders and would allow the resources of work relief, provided to care for the needy unemployed, to be diverted to the subsidization of unfair labor practices.

The requirement that the employer pay over to the fiscal agencies amounts equal to the work relief payments to its employees effectuates the policies of the Act much as does a back-pay order. If employers are permitted to deduct the amounts of relief payments from back pay, and to retain these amounts, the effect of a prospective back-pay order in deterring violation of the Act is substantially diminished. We do not suggest that any and every type of affirmative relief which would operate to deter violation of the Act should be sustained. The remedy should be directed to "removing or avoiding the consequences of violation", as said in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236, and may not be punitive. The affirmative relief here in question is not only necessary to preserve the deterrent effect of the back-pay order, specifically authorized by Congress, but serves to create, as nearly as may be done, the situation which would have existed but for the unfair labor

practices. It seeks to restore the innocent parties, both the employees and the fiscal agencies, to the position they would have occupied had not petitioner's unfair labor practices intervened.

Petitioner contends, however, that reimbursement will cause officials of governmental agencies to prefer strikers in accepting applicants for work relief, and will thus encourage employees to resort to industrial strife (Br. 15). In the first place, it is apparent that the employee is in no better position for having gone on strike, since the work relief payments will be deducted from his back pay. His only benefit is the immediate assistance which the work relief agency gives him during his period of idleness. Moreover, it is the practice of the Board, followed here, to order back pay only for periods when employees are out of work as the result of a discriminatory lay-off, discharge, or denial of reinstatement, and not for periods when employees are voluntarily on strike, even though the strike is provoked by the employer's unfair labor practices. See *Republic Steel Corp.* v. *National Labor Relations Board* (supplemental opinion filed September 30, 1940, C. C. A. 3d). Finally, petitioner's argument constitutes, in effect, a plea that a sanction available before adoption of the Act to discourage employees from striking against invasion of their rights of self-organization and collective bargaining, namely, the privation arising from unemployment during a

long-drawn-out strike, must be preserved, and that any construction of the Act which permits impairment of that sanction should be disapproved. This contention is conclusively rebutted by Section 13, providing that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

While petitioner's argument about promotion of strikes is thus insubstantial, it is, we think, factually sound in so far as it resognizes the probable influence of reimbursement on relief agencies. Certainly a denial of reimbursement may be expected to lead relief agencies to view with disfavor employees who are out of work as a result of a labor dispute or discriminatory discharge, since they are contingently in a better position than are employees with no possibility of reinstatement or back pay. Thus, without the provision here in question, the economic sanction against strikes will not merely be preserved, but will be strengthened, in contravention of the policy of Section 13. Avoidance of such a result tends, we submit, to effectuate the policies of the Act, not to thwart them.

The reimbursement provision will, in these two ways, tend to remove consequences of petitioner's violations of the Act which "are of a kind to thwart the purposes of the Act" (the *Consolidated Edison* case, 305 U. S. at 236.) Reimbursement

will avoid the consequence, which would be host to effectuation of the Act, of petitioner's shifti to relief agencies the financial burden of back p and thereby avoiding in part the deterrent eff of a back-pay order. And it will encourage reli agencies to support employees out of work as t result of a labor dispute, or, at least, not discoura them from so doing, thereby mitigating the cons quences of unlawful discharge or lay-off and saf guarding the employees in the assertion of the rights under the Act.

Petitioner contends that "the purposes of t Act are merely to protect the right of employee and that the reimbursement provision is inval because "it does not assist in restoring the e ployee to status quo" (Br. 13). As has be shown and as petitioner recognizes, although t agencies are the primary beneficiaries of rei bursement, the employees also benefit by means the increased protection and security assured the in the exercise of the rights conferred by Secti 7 of the Act. And nothing in the language of Se tion 10 (c) limits affirmative relief to action whi will directly or immediately benefit employees restoration of their status quo. The sole limitati which appears there is that the relief shall effect ate the policies of the Act. That requirement, have shown, is fulfilled here.

The Act was not framed as a code of priva labor law. Its purpose is public, not private, a

the Board, in framing remedies under it, acts only for protection of the public interest. Section 1 of the Act; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 24. Hence the reimbursement of public agencies which have assumed burdens which in law belong to the employer comes within the Board's power. The burden of economic dislocation resulting from unfair labor practices has been placed upon the already overburdened work-relief agencies. The correction of this condition, harmful to the public in general as well as to the unemployed in particular, surely comes within the Board's remedial power. Back pay and reinstatement themselves are not mere private rights of action. They are remedies of a public nature. *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146 (C. C. A. 5th); *National Labor Relations Board* v. *Colten,* 105 F. (2d) 179 (C. C. A. 6th). The same is true of reimbursement of those public agencies which have, for a temporary period, fulfilled those duties which the Act contemplates shall be assumed by the offending employer.

The direction to reimburse relief funds was not conceived by the Board out of thin air as a device to penalize petitioner. The Board was faced with a practical situation. Ordinarily petitioner would simply have been ordered to restore

back pay to the employees, which would have compensated them for lost wages. But an outside factor intervened. As brought out by the S. W. O. C., undoubtedly various of the workers had, during their period of unemployment, been supported by work relief funds. These work relief funds were, it seemed to the Board, a sort of windfall, which neither petitioner nor the employees were entitled to retain. See R. II, 1096. The Board's problem was thus similar to that which confronted Congress when the A. A. A. processing and floor stock taxes were invalidated by this Court. See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. And compare *United States* v. *Morgan,* 307 U. S. 183. In this situation the Board ordered that the amounts of these relief funds be restored to the governments.

It would be going far to hold that this disposition of the question was not within the power of the Board. The remedies which the Board may utilize in the enforcement of the Act are in their nature equitable. Surely the Board, like the courts in reviewing its orders, "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373. In this light the Board's power to effectuate the policies of the Act should not be narrowly construed. It does not suffice to say that the Board could merely leave

the situation as it found it, for it had of necessity to decide whether to permit petitioner to deduct the amounts of the relief payments from the back pay. If the Board was competent to decide that the employees should not be permitted to retain the benefits of the relief payments, as of course petitioner does not deny, the Board was also competent to decide that the amounts of the relief payments should not be credited to petitioner but should be restored to the governments which provided them.

B. THE REIMBURSEMENT PROVISION IS REMEDIAL, NOT PUNITIVE

In ordering reimbursement of relief funds, the Board proceeded, as petitioner asserts (Br. 27), on the premise that the governments financing the relief projects had borne losses accruing from petitioner's unfair labor practices. Petitioner attacks this premise that the projects suffered loss, asserting, first, that if the projects had not employed petitioner's employees they would have employed other persons, and, second, that the projects received value in labor for the wages they paid (Br. 15 ff.). Therefore, petitioner asserts, work relief projects stand, as a matter of law, in exactly the same position as do private employers for whom its employees may have worked (Br. 16). That a work relief project which supports employees illegally thrown out of work bears no loss because it receives work for wages is likewise the chief basis of those lower-court decisions which have

refused to enforce the reimbursement provision. See Br. 18–19. And, like petitioner, those decisions conclude that since the governments are ordered reimbursed for losses they never bore, the order is punitive, and not remedial.

Whether a work relief project which supports employees illegally thrown out of work does thereby suffer loss, or whether, because it receives work for wages, it suffers no loss, turns, we think, on the basic functions and objectives of work relief. For enlightenment on this score we turn to the operations of the federal work relief program, administered by the Work Projects Administration (W. P. A.), formerly called the Work Progress Administration.[1]

The federal work relief program, first instituted in its present form under authority of the Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat 115, was designed to meet the problem of large-scale unemployment produced by a depression of

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[1] State work relief appears to be quantitatively unimportant and to possess in general the same characteristics as that carried on through the W. P. A. See Robert C. Lowe, State Public Welfare Legislation (Works Progress Administration, Division of Research, 1939).

Work relief is, of course, to be distinguished from public works. The program of the federal Public Works Administration is carried out through contracts with private firms and the Board does not regard P. W. A. projects as work relief projects within the meaning of its back pay orders. Petitioner repeatedly confuses W. P. A. with P. W. A. (see Br. 8–9, 16).

more than five years' duration. The purpose of the program was to provide useful work at security wages for the employable unemployed. While the program has always emphasized the useful character of the projects constructed, and their value to the several communities, its primary objective has always been to furnish work and sustenance for the needy unemployed.[2]

This basic policy has conditioned the character of the entire work relief program; and from it have proceeded various subsidiary characteristics which patently differentiate work relief projects from ordinary private business and from other governmental activities.

The number of jobs provided by the W. P. A. has varied considerably during each of the four years in which the program has operated, generally paralleling the course of unemployment over the period. Employment on the program has been expanded during periods when private employment has declined and has been contracted when the number of persons in need of W. P. A. employment has fallen off

[2] Report on the Works Program Through December 1935, Works Progress Administration, February 15, 1936, Part I, pp. 7–9; Hearings on S. Res. 36, Unemployment and Relief, U. S. Senate, 75th Cong., 3d Sess., pp. 1345–1346, 1355; Hearings before the Subcommittee of the Committee on Appropriations, on H. Res. 130, 76th Cong., 1st Sess., Part 1, pp. 19, 454, 457–458, 494, 498, 1266; Millis and Montgomery, *Labor's Risks and Social Insurance* (1938), pp. 95–96.

as a result of increased employment in private industry.[3]

Work relief projects have not been selected or constructed with a single eye toward costs or usefulness. Projects roviding the greatest number of jobs in proportion to the amount expended have been favored. Likewise projects have been chosen to fit the number and type of needy unemployed workers in the various communities. This, of course, is in marked contrast to the conduct of private business or of other activities of the government, where the workers are selected to fit the jobs rather than the jobs to fit the workers. The work-relief statutes themselves have limited the proportion of the appropriations which may be spent on nonlabor costs, thus assuring that a maximum number of jobs would be provided.[4] Further to effectuate this policy, the use of labor-saving machinery has been limited on work-relief projects.[5]

The policies and procedures followed in the selection of persons for the federal work relief

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[3] Report on the Progress of the W. P. A. Program, Federal Works Agency, Works Progress Administration, June 30, 1939, p. 1.

[4] E. g. Section 1 (c) of the Emergency Relief Appropriation Act of 1939, c. 252, 53 Stat. 927.

[5] Hearings before the Subcommittee of the Committee on Appropriations, on H. Res. 130, 76th Cong., 1st Sess., Part 1, p. 1266; Report on Progress of the W. P. A. Program, Federal Works Agency, Works Progress Administration, June 30, 1939, p. 1.

program are also notably different from personnel policies in vogue elsewhere. "In order that the operation of the W. P. A. projects will have a maximum effect in relieving distress caused by unemployment, the W. P. A. requires that at least 95 percent of the persons assigned to its projects in each state be certified as in need of relief."[6] Those who are given W. P. A. employment cannot retain it after refusing a *bona fide* offer of ordinary employment, since the purpose of the work relief program is to care for the needy unemployed only until other forms of employment reabsorb them.[7] Likewise W. P. A. workers are kept under constant pressure to seek other forms of employment. All non-war veterans engaged in W. P. A. projects for 18 continuous months are automatically purged from the rolls for a period of 30 days, and may be reinstated only after proof of inability to secure other work and on certification as in need or relief.[8] At the present time W. P. A. workers

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[6] Report on Progress of the W. P. A. Program, Federal Works Agency, Works Progress Administration, June 30, 1939, p. 4.

[7] Emergency Relief Appropriation Act of 1939, c. 252, 53 Stat. 927, sec. 17 (a); Hearings before the Subcommittee of the Committee on Appropriations, on H. Res. 130, 76th Cong., 1st Sess., Part 1, pp. 13, 423; Report on the Progress of the W. P. A. Program, Federal Works Agency, Works Progress Administration, June 30, 1938, p. 6.

[8] Section 15 (b) of the Emergency Relief Appropriation Act, fiscal year 1941, Public Resolution No. 88, 76th Cong., 3d Sess.

receive monthly wages in accordance with an established schedule which is designed to meet family subsistence requirements.[9]

Furthermore the origins and history of the federal work relief program reveal that it was conceived as a superior substitute for direct relief, and that its purpose was to provide aid for the needy and employable unemployed without resort to the dole.[10] That the W. P. A. program was instituted as a means of dealing with the relief problem is dramatically indicated by the fact that since the commencement of the W. P. A., federal appropriations for direct relief have declined to the point of virtual cessation.[11]

It is thus apparent that the fundamental function and objective of work relief is to supply subsistence to the needy unemployed. The chief pur-

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[9] Report on Progress of the W. P. A. Program, Federal Works Agency, Works Progress Administration, June 30, 1939, p. 140; Corrington Gill, "W. P. A.," in Current History, Vol. 48, p. 38 (January 1938).

[10] Hearings before the Committee on Appropriations, U. S. Senate (Procurement Div., U. S. Treasury), 74th Cong., 1st Sess., pp. 9, 11, 42, 59, 94–95; Message from the President, April 27, 1939, 76th Cong., 1st Sess., Document No. 270, p. 1; Millis and Montgomery, *Labor's Risks and Social Insurance* (1938), pp. 95–96, 102; *Trends in Relief Expenditures*, 1910–1935, Works Progress Administration, Division of Social Research (1937), pp. 51–52, 62, 63, 67, 71, 73–74, 77, 78.

[11] *Trends in Relief Expenditures*, 1910–1935, Works Progress Administration, Division of Social Research (1937), p. 7; Hearings before the Special Committee on Unemployment and Relief, U. S. Senate, 75th Cong., 3d Sess., pp. 432–433.

pose of the payment of relief work wages is not to secure from the recipients that *quid pro quo* which petitioner emphasizes, but to provide aid to them. Work relief is, in other words, basically a relief device and not a public works program. It is too plain for argument that Congress views W. P. A. expenditures chiefly as money out of pocket, not as money spent for needed public works. Work relief thus represents loss to the governments, and any increase in the persons to be supported by work relief represents additional loss. This loss should not be obscured by the fact that the work relief projects receive work in return for wages. For the governments are not primarily investing in that work but are using it as a relief device.[12]

These facts are all of common knowledge. So much so that it seems strange to suggest that additional persons on relief do not represent loss to the government because they work for their relief wages. If the governments had resorted to direct relief, rather than to work relief, it would not be

[12] "This work is being done because these men are broke and out of work. That is the only reason it is being done. If these men were not broke and out of work, this program would never have been suggested, and we say to them that the Government proposes to offer them an opportunity until they can get back into private industry. Instead of having to take relief as such—which is repugnant to them—we will offer them an opportunity for a work benefit * * *." Testimony of Mr. Hopkins, Hearings, Committee on Appropriations, U. S. Senate (Procurement Div., U. S. Treasury), 74th Cong., 1st Sess., p. 9.

suggested that relief payments did not represent a loss to them, or that petitioner had not occasioned this loss. That the governments resorted to work relief does not fundamentally alter the situation. As is well known, they were but making the best of a bad situation—the best from the standpoint both of the governments and of the unemployed—by securing projects useful to the governments and at the same time affording work to maintain the skills and morale of the workers.

Petitioner's speculation (Br. 17) that if its employees had not been placed on relief projects, other persons would have been, does not tend to prove that the projects suffered no loss from supporting petitioner's employees. For if other persons would have been employed additional needy persons would thereby have been given subsistence. So far as petitioner thwarted such an extension of assistance by diverting relief funds, it defeated *pro tanto* the objective of the work relief program and occasioned loss to the governments.

It was thus, we submit, entirely proper for the Board to conclude that the support of petitioner's employees, whom petitioner had illegally thrown out of work, occasioned losses to the governments financing the work relief projects. To the extent that the agencies paid out money for the support of petitioner's employees, who would have been self-supporting but for petitioner's unfair labor practices, the agencies suffered loss by reason of

petitioner's actions, and the order that the sums paid out by them be restored by petitioner was reimbursement of money equitably due, not a "gratuitous benefit" as petitioner insists.

C. THE BOARD COULD PROPERLY HOLD THAT THE EMPLOYEES' RIGHTS TO THE AMOUNTS OF THE RELIEF PAYMENTS ARE SUPERIOR TO THOSE OF PETITIONER, AND COULD PROPERLY REQUIRE THAT THE EMPLOYEES REIMBURSE THE GOVERNMENTS

What we have said thus far has assumed that the only issue was between petitioner and the governments. But that is not the case, for there is also involved the right of petitioner's employees, as against both petitioner and the governments, to the amounts of the relief payments. We shall seek to show that the Board, in its discretion, could hold that as between petitioner and its employees it is the employees who are entitled to retain the work relief payments. And, as we shall seek further to demonstrate, the Board could properly require that the employees reimburse the governments for the relief payments.

It is in this context that the validity of the Board's order must be considered. In form the Board's order requires petitioner to reimburse the agencies. But in substance the order may as readily be viewed as determining that petitioner shall reimburse the employees for back pay lost, but that the employees, in turn, shall reimburse the governments for interim support. In this view it is but a bookkeeping convenience for petitioner to

pay the governments directly. Certainly the Board's order may be considered in this light if necessary to sustain its validity.

1. The Board could properly decide that the employees are entitled, as against petitioner, to the amounts of relief payments

The question of reimbursement for relief payments wholly aside, the Board could properly decide that as between petitioner and its employees the latter are entitled to retain the relief payments. The Board, that is to say, could, in its discretion, decide that there should be no deduction of relief payments from the back pay which it requires the employer to restore to the employees.

As has been shown, reimbursement of employees for pay lost as a result of the employer's unfair labor practices is a basic remedy under the Act. The Board does not, of course, direct the employer to make compensation if the employee has sustained no loss in wages earned; hence the Board has consistently, in its back-pay orders, provided for deduction of the amounts earned by the discharged worker in the service of other employers. When however, the employee has received from third parties benefits which are not in the nature of earnings, the Board has not permitted their deduction. See, e. g., *Matter of Vegetable Oil Products Co., Inc.*, 5 N. L. R. B. 52, 53 (home relief); *Matter of Missouri-Arkansas Coach Lines, Inc.*, 7 N. L. R. B. 186, 206 (unemployment insurance and

union relief benefits); *Matter of Lone Star Bag and Bagging Co.*, 8 N. L. R. B. 244, 262–263 (union benefits); *Matter of Sterling Corset Co., Inc.*, 9 N. L. R. B. 858, 871 (union benefits); *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88, 128 (union benefits).

This is but adherence to a principle widely accepted at common law. Thus, "in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned [in other employment] * * * from what he would have received had there been no breach, furnishes the ordinary measure of damages." 5 Williston, Contracts (rev. ed.) § 1358. But a person tortiously injured may recover for loss of earnings or earning capacity without deduction of benefits received from third persons. 4 Torts Restatement § 920, Comment e, § 924 (b) and comment thereon. This doctrine applies whether the benefits received by the plaintiff are wages from his employer paid either under the contract of employment [13] or as a gift,[14] receipts

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[13] *Shea* v. *Rettie*, 287 Mass. 454, 458–459; *Elmer* v. *Fessenden*, 154 Mass. 427, 428–429; *Wachtel* v. *Leonard*, 45 Ga. App. 14; *Hoobler* v. *Voelpel*, 246 Ill. App. 69, 78–79; *International etc. R. R. Co.* v. *Haddox*, 36 Tex. Civ. App. 385, 387; *Campbell* v. *Sutliff*, 193 Wis. 370, 374; 18 A. L. R. 678.

[14] *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607–608; *Campbell* v. *Brandenburger*, 35 Del. 203, 209; *Nashville etc. Ry. Co. v. Miller*, 120 Ga. 453, 457; *The Ohio etc.* v. *Dickerson*, 59 Ind. 317, 324; *Williams* v. *St. Louis etc. Ry. Co.*, 123 Mo. 573, 585; *Illinois Cent. R. R. Co.* v. *Porter*, 117 Tenn. 13,

from an insurance policy,[15] or charitable gifts.[16] While no authority has been found on this point in the field of contract law, undoubtedly the same rule should apply, *i. e.*, that benefits other than earnings received by the employee from third persons do not mitigate his damages for breach of the employment contract. There is no difference in principle in the two fields, as shown by the fact that the measure of damages for loss of earning capacity because of personal injury, and the rule as to mitigation of such damages, are the same as in the case of breach of an employment contract. See 4 Torts Restatement § 924, comment on clause (b).

The basis of this principle is clear. The wrong, whether it be an unfair labor practice or an ordinary tort, is deprivation of the opportunity to earn

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22-23; *Missouri Pac. Ry. Co.* v. *Jarrard*, 65 Tex. 560, 566; *Graves* v. *Poe*, 118 S. W. (2d) 969, 970 (Tex. Civ. App.); *Cunnien* v. *Superior Iron Works*, 175 Wis. 172, 188; 18 A. L. R. 678; 1 Sedgewick on Damages (9th ed.) § 67.

[15] *Cox* v. *City of Chicago*, 83 Ill. App. 540, 542; *Louisville etc. R. R. Co.* v. *Carothers*, 23 Ky. L. Rep. 1673, 1674; *Rusk* v. *Jeffries*, 110 N. J. L. 307, 311; *Littman* v. *Bell Telephone Co.*, 315 Pa. 370, 381; *Heath* v. *Seattle Taxicab Co.*, 73 Wash. 177, 186; *Cunnien* v. *Superior Iron Works Co.*, 175 Wis. 172, 187–188; *Campbell* v. *Sutliff*, 193 Wis. 370, 374–375; 1 Sutherland on Damages (4th ed.) § 158; cf. *Francis* v. *Atchison etc. Ry. Co.*, 113 Tex. 202, 211; 18 A. L. R. 678.

[16] *Norristown* v. *Moyer*, 67 Pa. 355; cf. *Roth* v. *Chatlos*, 97 Conn. 282, 288; *Workmen's Compensation Bd.* v. *Rutherford*, 59 Ont. L. Rep. 364, 367; 1 Sedgewick on Damages (9th ed.) § 67.

a living. The measure of the wrong is the value of the opportunity denied; and the measure is not reduced simply because some third person supplies the employee with some of the benefits he could have obtained as the fruits of ordinary work. The wrongdoer should not, as a matter of policy, be permitted to derive advantage from benefits conferred upon his victim by third parties, or secured by the victim's own prior expenditures or foresight, as insurance or strike benefits, even though the victim's damages are in fact decreased by such benefits, which he would not have received but for the injury.

In the setting of this principle, the issue then is whether the Board could properly hold that monies received from work-relief agencies resemble such benefits from outside sources, more than they do earnings from ordinary employment. If work-relief payments could rationally be differentiated from normal earnings, then the Board would be justified in refusing, in its discretion, to let respondent deduct work-relief payments from the back pay of its employees to whom it wrongfully denied employment. And that work relief, in a number of vital respects, possesses the characteristics of direct relief rather than those of ordinary employment, whether private or governmental, has already been abundantly demonstrated in the discussion of the nature of the W. P. A., *supra,* pp. 20–25. Certainly a conclusion by the National

Labor Relations Board that the dissimilarity of work relief to ordinary employment was basic enough to justify a refusal to permit the employer to deduct these sums from back pay due his employees would not transcend the bounds of rational judgment. If such a judgment would be rooted in reason, then it is within the discretion which Section 10 (c), commits to the Board. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265.

That such a view, taken by the Board, would not exceed the bounds of its discretion is further shown by the widespread judicial recognition of the distinction between work-relief payments and ordinary earnings. The employee, when a judgment-debtor, need not pay over to his judgment-creditor monies received from work-relief agencies. *Dibner* v. *Cousminer*, 157 Misc. (N. Y.) 229. Likewise, in a number of cases, state statutes establishing "settlement" periods as a condition for the eligibility of unemployed persons to receive local relief have been construed to include time spent on work relief as coming, along with other forms of relief, within the exemptions to the "settlement" period. *In re Settlement of Hanson*, 206 Minn. 371; *In re Matruski*, 169 Misc. (N. Y.) 316, *In re Youngs*, 172 Misc (N. Y.) 155; Wisconsin Statutes, § 49.02 (4). Cf. *United States* v. *Owlett*, 15 F. Supp. 736 (E. D. Pa., 1936); *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn., 1939); *City of Los Angeles* v. *Industrial Acc. Commission*, 9 Cal. (2d) 705.

2. The Board could properly require that the employees reimburse the governments

The remedies which the Board may utilize in the enforcement of the Act are in their nature equitable. The employees whose rights petitioner has denied and infringed were assisted by the various work relief agencies through the provision of sustenance for themselves and their families. Since, as petitioner states (Br. 15), there have never been enough work relief jobs to satisfy the available and deserving applicants, this assistance to petitioner's employees has been at the expense of other needy unemployed workers. The reparation of the wrongs which petitioner has inflicted upon these employees places them in position to reimburse the work relief agencies without net loss to themselves. While not legally bound to do so, it is certainly not inequitable for the Board to take cognizance of this relationship between the agencies and the employees, and to attach as a condition to its remedies the performance by the employees of what the Board might regard as an equitable obligation. This is in effect what the Board has done.

Just as one who furnishes the victim of a tort with medical care or other necessities is entitled to recover from the tort-feasor, so these agencies who have succored the victims of petitioner's unlawful conduct are equitably entitled to be subrogated to the employees' right of restitution from

the employer. See Restatement of Restitution, §§ 113, 114.

D. PETITIONER'S OTHER OBJECTIONS TO THE REIMBURSEMENT ORDER ARE INSUBSTANTIAL

1. The government or governments which supplied the funds for the work relief projects were not parties to this case and did not request reimbursement as ordered by the Board. Petitioner asserts that it was therefore improper for the Board to concern itself with their interests (Br. 20–22). The validity of the reimbursement provision must be determined upon the considerations discussed above, going to the question whether it effectuates the policies of the National Labor Relations Act. The absence from this proceeding of entities incidentally benefited by a provision which does effectuate the policies of the Act is immaterial. Compare *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350.

2. Petitioner complains that there is no evidence in the record that the work relief projects on which its employees worked sustained any losses as a result of such work; that there is therefore no evidence from which the Board could conclude that reimbursement of the projects would effectuate the policies of the Act (Br. 24–28). The nature of work relief projects, which is decisive of whether the governments suffered loss, is a matter of common knowledge, and is fully revealed in public

documents. Hence there was no occasion to take evidence on it.

3. Petitioner contends that the Board made no sufficient finding that its reimbursement order would effectuate the policies of the Act (Br. 26–27). The Board's specific finding as to the work relief provision (R. II, 1096) is set out by petitioner at Br. 26. In addition, the Board prefaced the affirmative provisions of its order with a general finding that the action ordered would effectuate the policies of the Act (R. II, 1105). Petitioner attacks the Board's specific finding on the ground that it is phrased negatively, and the Board's general affirmative finding on the ground that it must be construed in the light of the specific negative finding, with the result that there remains no finding whatever. These arguments border on the frivolous. There is no doctrine that the Board's findings must be cast in any particular form, or that an affirmative general finding becomes negative because the subsidiary findings are posited negatively.

4. Petitioner argues that there is serious question as to the authority of the fiscal agencies of the federal and state governments to accept reimbursement from petitioner in accordance with the Board's direction (Br. 20–23). Nothing cited in petitioner's brief even remotely supports the argument made, and petitioner's discussion suggests that petitioner really questions the authority

of relief agencies, rather than of fiscal agencies, to accept the payments (see Br. 22–23). In any event this is not the place to decide that question. If the Board's order is upheld, and petitioner undertakes compliance, the fiscal agencies themselves will decide whether they have authority to receive the sums offered. If they refuse proffered payments, the court below will decide whether any further action is required of petitioner under its decree.

5. Petitioner asserts that it "cannot properly be required to ascertain in what proportion, if any, the fiscal agencies of the government or governments, to which payments are ordered to be made, have supplied funds for the work relief projects which have paid moneys to the employees" (Br. 20–21. The Board's order directs petitioner to deduct the amounts of relief payments from back pay and to pay over such amounts to the appropriate fiscal agency of the government or governments which supplied the funds for the work-relief projects. The *amounts* of relief payments are readily obtainable from the respective employees, and indeed are already being ascertained by the Board through individual sworn statements. These amounts must be ascertained, regardless of whether petitioner prevails and retains the money or is required to pay it over to the fiscal agencies. The *sources* of the relief payments are readily ascertainable from the files of the relief agencies,

and in case of dispute the issue of the amounts due the various fiscal agencies, if more than one is involved, may be speedily determined by reference of the matter to a master by the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

FRANCIS BIDDLE,
Solicitor General.
CHARLES FAHY,
Assistant Solicitor General.
THOMAS E. HARRIS,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
MORTIMER B. WOLF,
MORRIS P. GLUSHIEN,
Attorneys,
National Labor Relations Board.

OCTOBER 1940.

APPENDIX

NATIONAL LABOR RELATIONS ACT

(Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. V, § 151 *et seq.*)

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or dis-

the market for goods flowing from or into the
nels of commerce.

ne inequality of bargaining power between em-
ees who do not possess full freedom of associa-
or actual liberty of contract, and employers
are organized in the corporate or other forms
wnership association substantially burdens and
ts the flow of commerce, and tends to aggra-
recurrent business depressions, by depressing
e rates and the purchasing power of wage earn-
n industry and by preventing the stabilization
ompetitive wage rates and working conditions
in and between industries.

xperience has proved that protection by law
ne right of employees to organize and bargain
ctively safeguards commerce from injury, im-
ment, or interruption, and promotes the flow of
merce by removing certain recognized sources
ndustrial strife and unrest, by encouraging
tices fundamental to the friendly adjustment
ndustrial disputes arising out of differences as
ages, hours, or other working conditions, and
estoring equality of bargaining power between
loyers and employees.

is hereby declared to be the policy of the
ted States to eliminate the causes of certain
tantial obstructions to the free flow of com-
ce and to mitigate and eliminate these obstruc-
s when they have occurred by encouraging the
tice and procedure of collective bargaining and
rotecting the exercise by workers of full free-
of association, self-organization, and designa-
of representatives of their own choosing, for
urpose of negotiating the terms and conditions

of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other

means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike:

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